No. 17-1104

In the

Supreme Court of the United States

AIR AND LIQUID SYSTEMS CORP., et al.,

Petitioners,

v.

ROBERTA G. DEVRIES, Administratrix of the Estate of John B. DeVries, Deceased, et al.,

Respondents.

On Writ of Certiorari to the Court of Appeals for the Third Circuit

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The National Association of Manufacturers ("NAM") is the nation's largest manufacturing association, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers

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[1] The parties have consented to this filing. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund its preparation or submission.

compete in the global economy and create jobs across the United States.

Amici's membership includes many companies that are government contractors or are involved in the maritime trades and thus may be subject to burdensome litigation and potential liability under the Third Circuit's decision in this case. These members, as well as other American businesses, are concerned by the Third Circuit's ruling that a manufacturer may be liable for injuries caused by asbestos, decades or more after the fact, even if it did not make or distribute any asbestos-containing product.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Third Circuit eschewed its responsibility to make a clear legal determination in favor of punting an unnecessary factual inquiry to the factfinder. The court should have adopted a uniform rule that manufacturers of bare-metal products cannot be held liable under maritime law for injuries caused by asbestos parts produced and installed by other parties. Instead, the court erroneously employed "a more fact-specific standard [that] ask[s] whether the facts of the case made it foreseeable that hazardous asbestos materials would be used." Pet. App. 3a–4a.

There are strong doctrinal reasons favoring the straightforward rule the court below rejected. This Court has long "recognized that vindication of maritime policies demand[s] uniform adherence to a federal rule of decision." *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 210 (1996). By

ensuring "a system of law coextensive with, and operating uniformly in, the whole country," maritime law provides uniform rules of conduct that permit commercial actors to accurately predict costs, risks, and potential liability. *Am. Dredging Co. v. Miller*, 510 U.S. 443, 451 (1994) (quoting *The Lottawanna*, 21 Wall. 558, 575 (1875)); *see also Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 676 (1982) (uniform rules of decision serve "the goal of promoting the smooth flow of maritime commerce"). This Court has also warned against multi-factor tests in admiralty cases because they are "hard to apply, jettisoning relative predictability for the open-ended rough-and-tumble of factors, inviting complex argument in a trial court and a virtually inevitable appeal." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995). For these reasons, the Court has rejected lower court decisions that are "too indeterminate to enable manufacturers easily to structure their business behavior." *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 870 (1986).

The Third Circuit acknowledged that the "rule-based approach is efficient and predictable," while "the standard-based approach is bound to be less predictable and less efficient." Pet. App. 11a. But despite this recognition, the Third Circuit held that a bare-metal manufacturer "may be held liable for a plaintiff's injuries suffered from later-added asbestos-containing materials if the facts show the plaintiff's injuries were a reasonably foreseeable result of the manufacturer's failure to provide a reasonable and adequate warning." Pet. App. 15a. The court adopted a complicated multi-factor test and invited

further complication, stating that the factors it identified "may or may not be the only facts on which liability can arise" and that the "finer contours of the defense . . . must be decided on a case-by-case basis." Pet. App. 16a. Because respondents' claims implicated foreseeability and foreseeability is a fact question, the court concluded, their claims must be recognized and sent to the factfinder. The Third Circuit justified this choice—otherwise so contrary to maritime law's preference for uniform, easily applied rules—by invoking maritime law's "special solicitude for sailors' safety," which it said "favors the adoption of the standard-like approach to the bare-metal defense." Pet. App. 13a.

The Third Circuit committed two critical errors. First, it improperly collapsed the traditional four-element test for tort liability into a single foreseeability analysis and ignored the court's duty to decide whether a given type of liability—especially one as novel as here—is reasonable in light of the goals of maritime law and should be recognized. Second, the Third Circuit's reliance on "special solicitude" for seamen was misplaced. The approach that admiralty courts may traditionally take in disputes between the master of a ship and a sailor has no application in a dispute between the manufacturer of bare-metal products and the plaintiffs in these cases. The Third Circuit's invocation of "special solicitude" for seamen transforms that principle from a limited one in keeping with the historic traditions of maritime law into an all-purpose thumb on the scale for plaintiffs.

The Court should hold that bare-metal manufacturers are not liable under maritime law to plaintiffs claiming injuries caused by others' asbestos products, reverse the decision below, and direct the entry of summary judgment in favor of petitioners.

ARGUMENT

I. The Third Circuit Abdicated Its Role As A Common Law Court Charged With Setting Limits On The Scope of Tort Liability.

The Third Circuit's adoption of what it called a "standards-based approach" to bare-metal claims rests on a single premise: When a claim implicates issues of foreseeability, it must go to the factfinder. This is wrong, both as a matter of traditional tort law and in the specific context of maritime law. To the contrary, this Court and other courts have repeatedly recognized that maritime courts are responsible for setting limits on the scope of tort liability as a matter of law.

A. Even Where Foreseeability Is At Issue, Courts Have a Role To Play In Limiting The Scope of Tort Liability.

Where sitting in admiralty, federal courts are common law courts, applying the traditional elements of duty, breach, causation, and damages to maritime torts. 1 Thomas J. Schoenbaum, *Admiralty & Mar. Law* § 5–2 (5th ed. 2017) (elements of a negligence action under maritime law are "essentially the same as land-based negligence under the common law"); *E. River S.S. Corp.*, 476 U.S. at 864 (maritime rules are derived from common law sources). It is a commonplace that foreseeability is a

concept embedded in both the duty and causation elements of this traditional structure, as the Third Circuit recognized. Pet. App. 7a (the bare-metal defense "is rooted in both duty and cause because its keystone is the concept of foreseeability"). *See also* 3 *Am. Law of Torts* § 11:3 (2018) (foreseeability is "sometimes framed in the concept of 'duty,' in other instances as one of 'proximate cause'").

From this unremarkable observation, the Third Circuit went awry by collapsing the traditional tort elements of duty and causation into an analysis of "foreseeability" alone—and then compounded that error by presuming any claim that implicates issues of foreseeability cannot be determined by the court as a matter of law. In adopting this course, the court reasoned that: (1) foreseeability is an aspect of negligence liability; (2) respondents' argument against the bare-metal rule raised issues of foreseeability; and (3) foreseeability is generally a fact issue, so (4) the bare-metal issue therefore must go to the factfinder. The court openly acknowledged that its self-conscious choice of a "standard-based approach" is bound to be "less predictable and less efficient, because the standard's fact-centered nature will push more cases into discovery" and, as here, past summary judgment and to trial. Pet. App. 12a.

The Third Circuit was mistaken that a foreseeability test applies at all when a plaintiff asserts a negligence claim against one defendant for *an injury caused by a third party's product*. But even if foreseeability had some role to play in such a claim, the Third Circuit was mistaken in its view that a claim that implicates foreseeability must, for that

reason alone, go to the factfinder. Even in cases where foreseeability is relevant, it is a necessary, but not sufficient, requirement for tort liability. In every negligence case, a fundamental question is whether the defendant owes some duty to the plaintiff. The question of duty may implicate foreseeability, but it is not limited to foreseeability alone.

The decision below is an invitation to send every negligence claim to the jury, since "[i]n a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond." *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 838 (1996) (quoting *Prosser and Keeton on Torts* 264 (5th ed. 1984)). But that ignores the court's obligation to evaluate whether the alleged consequences would create a cause of action as a matter of law. Courts have long recognized that even where determining duty requires consideration of whether an injury to a particular plaintiff was foreseeable, the courts must still determine the scope of duty as a matter of law. *See* 57A Am. Jur. 2d *Negligence* § 78 (2014) ("The court determines, as a matter of law, the existence and scope or range of the duty, that is whether the plaintiff's interest that has been infringed by the conduct of the defendant is entitled to legal protection."); Dan B. Dobbs, *The Law of Torts* § 149, at 355 (2000); Restatement (Second) of Torts § 328B (1965). Petitioners thus identified categories of cases where claims for injuries caused by products fail as a matter of law, regardless of whether it may be foreseeable that the defendant's product will be used in combination with some other, injury-causing, product. Pet. Br. 19–20.

A maritime court's responsibility to police the scope of tort liability is broader than fitting an inquiry into a doctrinal box labeled "duty" or "causation" and proceeding accordingly. Instead, based on a matrix of precedent, policy questions, and prudential considerations, common law courts are tasked with determining whether to recognize a given species of liability, even when the claim implicates questions of foreseeability. Judge Cardozo and the New York Court of Appeals, as the most famous example, were not dissuaded from determining as a matter of law that Mrs. Palsgraf could not recover even though her claim put at issue whether her injury was a foreseeable consequence of the railroad's negligent act. *See Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 100 (N.Y. 1928).

The lesson of *Palsgraf* is that just because the plaintiff contends that her injury should have been foreseeable to the defendant, that does not mean that the claim has to go to the jury. Common law courts have an important role to play in ensuring that the law develops in reasonable ways; their job is not to simply punt novel issues to the jury and hope for the best. Rather, whether a particular harm is within the "range of reasonable apprehension" of the risk "is at times a question for the court." *Id.* at 101. As a leading treatise puts the point, the common law court's job is to decide, given the relationship between the plaintiff and the defendant, whether "the law imposes upon the defendant any obligation of reasonable conduct for the benefit of the plaintiff. *This issue is one of law and is never for the jury.*" Prosser and Keeton on Torts 320 (emphasis added). The common law court thus has a "traditional role" to

play "in setting the perimeters of negligence. . . . It remains the court's duty to examine the facts of each particular case for that purpose." *Quinlan v. Cecchini*, 363 N.E.2d 578, 581 (N.Y. 1977).

To be sure, federal courts may not have frequent occasion to act as common law courts, but maritime courts *are* common-law courts and these fundamental principles of the common law hold equally true in the maritime context. *See Sofec*, 517 U.S. at 838 (rejecting the assertion that courts should "eschew in the admiralty context the 'confusing maze of common-law proximate cause concepts'" that limit liability).

For these reasons, the court below elided the key question—whether recognizing liability in these circumstances is consistent with the goals of maritime law—when it treated foreseeability as dispositive. According to the court below, "[w]hen parties debate the bare-metal defense, they debate when and whether a manufacturer could reasonably foresee that its actions or omissions would cause the plaintiff's asbestos-related injuries." Pet. App. 7a. But reducing the entire analysis to a factual debate over foreseeability oversimplifies matters. In discharging its duty to draw reasonable lines in developing the law, a common law court should conclude that claims like respondents' should be dismissed even if it may "sometimes" (Pet. App. 7a–8a) have been foreseeable to non-asbestos manufacturers like petitioners that their products could be fitted with asbestos-containing parts that could injure users. In declaring that the bare-metal defense is *nothing more* than the concept of

foreseeability and that this requires sending the claim to the jury, *id.*, the court below betrayed its lack of understanding of its responsibility as a maritime court. Whether bare-metal manufacturers can properly be held liable in negligence may implicate issues of foreseeability, but that hardly justifies elevating foreseeability above all other considerations, let alone banishing all other considerations from the analysis.

B. Maritime Courts Have Determined That Negligence Claims Fail As a Matter of Law Even When Foreseeability Is At Issue.

As a historical matter, federal courts have regularly conducted the required legal analysis. That is, whether couched as an inquiry into the scope of a duty, the remoteness of an injury, whether a plaintiff was or was not foreseeable, or in other terms, maritime courts have not hesitated to conclude as a matter of law that a defendant is not liable for an injury even where "the concept of foreseeability" may be implicated.

For example, in *The Eugene F. Moran*, 212 U.S. 466, 476 (1909), Justice Holmes noted that "[w]hen a duty is imposed for the purpose of preventing a certain consequence, a breach of it that does not lead to that consequence does not make a defendant liable for the tort of a third person merely because the observance of the duty might have prevented that tort." There, the Court had to allocate liability among various vessels—some passive barges and floats, others active tugs towing the former—for a collision. One barge was undoubtedly negligent for

failing to display a light, but that negligence did not appear to have caused the injury alleged; that is, the Court suggested, the harm was potentially not one within the risk of the barge's negligent behavior. *See also Am. Dredging Co. v. Gulf Oil Corp.*, 175 F. Supp. 882, 884 (E.D. Pa. 1959) ("[T]he scope of liability for negligent injury, both at common law and in admiralty, is normally limited by the principle that the injured person has a cause of action only if his interest, as in fact invaded, lay within the risk of harm which in legal contemplation made the actor's conduct blameworthy."), *aff'd*, 282 F.2d 73 (3d Cir. 1960).

Likewise, in *Sinram v. Pennsylvania R. Co.*, 61 F.2d 767 (2d Cir. 1932), Judge Learned Hand wrote that a tug owner was not responsible for the loss of a load of coal when its tug struck a barge in the East River, loosening planks on the barge's stern. Even though the barge driver "knew that she had been struck above the water line, and . . . that her injuries, if there were any, might not betray themselves by leaks while she was light," he did not go into the barge to inspect her hull from the inside, which would have shown cracks. *Id.* at 769. The barge then continued on for three days before leaks were discovered and the barge was inspected again; "apparently [the inspector] was satisfied that she was safe, but soon after she sank." *Id.* at 768. Judge Hand found that although the respondent's tug had indeed struck the barge, it was not foreseeable to the tug owner that the barge driver would conduct such a cursory inspection of the vessel after a serious collision. "In the case at bar it appears to us that the master of the No. 35, in approaching the barge at too

great speed, or at the wrong angle, need not have considered the possibility that if he struck her, she might be injured, that her bargee might be so slack in his care of her as to let her be loaded without examination, and might so expose her to the danger of sinking." *Id.* at 771.

In other cases, maritime courts have determined as a matter of law that a particular plaintiff was not foreseeable, even though the defendant's conduct was a factual cause of the injury. For example, in *Diamond State Tel. Co. v. Atl. Ref. Co.*, the tanker *Yeager* came upon two vessels lying stationary in the Delaware River with a telephone cable pulled up and laid upon their decks for repair. 205 F.2d 402, 404–05 (3d Cir. 1953). The vessels had ample lights on, but not the three red vertical lights required to show "cable raised and on deck." As the *Yeager* approached, the vessels sounded danger, but the *Yeager* ignored the signal, veering off only at the last minute—missing the ships but slicing through the cable. The court concluded that even though the *Yeager* could have veered off earlier and was negligently steered, it was not liable as a matter of law because the cable owner was not a foreseeable plaintiff:

> In our view of the case, it is irrelevant that the *Yeager* failed to stop in the face of a danger signal, that she crossed the *Adriatic*'s signal, and that she was also negligently navigated, because she did not collide with the *Adriatic* or *Acco*. . . . Here we have the unforeseeable libellant, a maritime instance of the landlubber's unforeseeable plaintiff.

Id. at 406–07.

Finally, maritime courts have held in a variety of contexts that defendants have no duty to avoid injury to plaintiffs, whether because of some intervening negligence or because policy considerations suggested that the goals of maritime law were better served by limiting liability in a particular circumstance. *See, e.g.*, *Liverpool, Brazil & River Plate Steam Nav. Co. v. Brooklyn E. Dist. Terminal*, 251 U.S. 48, 52 (1919) (Holmes, J.) (passive towed barge has no independent duty to avoid collision with another vessel); *Matter of the Complaint of Crounse Corp.*, No. 1:14-CV-154-SA-DAS, 2016 WL 4054929, at *3 (N.D. Miss. July 27, 2016) (same); *The New York Marine No. 2*, 56 F.2d 756, 757–58 (2d Cir. 1932) (barge lying close to tug had no duty to signal to passing vessels independently of tug); *Triangle Cement Corp. v. Towboat Cincinnati*, 280 F. Supp. 73, 75–76 (S.D.N.Y. 1967) (no duty to observe or avoid an unlighted or improperly lighted vessel), *aff'd*, 393 F.2d 936 (2d Cir. 1968).

In these cases, no less than in the present case, foreseeability was a relevant consideration. But in each, the court nonetheless disposed of the claims as

a matter of law, adopting precisely the kind of simple and workable rule, designed to produce uniform and predictable results, that the decision below rejected. Treating foreseeability as dispositive and letting the jury decide whether to recognize the novel form of liability sought by respondents is *faux* judicial modesty. The reality is that the court below expanded liability by recognizing a novel form of liability that petitioners could not have foreseen. Nor can calling its approach "the fact-specific standard approach" (Pet. App. 8a) justify this abdication of the court's common law duty, as it is the court's job to decide *which* facts are relevant and dispositive. The Third Circuit should have considered whether it is reasonable and just for the burdens of litigation and novel liability to run against petitioners in these circumstances, and it should have answered that question in the negative.

II. Maritime Law's Special Solicitude for Seamen Does Not Support the Third Circuit's Decision.

"First and foremost" among the reasons the Third Circuit invoked for its decision was maritime law's "special solicitude" for sailors, which it claimed "favors the adoption of the standard-like approach to the bare-metal defense." Pet. App. 13a. But "special solicitude" is not a free-floating thumb on the scale for the seaman in any personal injury case. Instead, special solicitude arises from, and is justified by, the peculiarly unequal relationship between the master and the sailor, which admiralty courts have historically sought to equalize through careful attention to the unique aspects of that relationship

and the seaman's situation. The Third Circuit never stopped to consider whether the parties in a bare-metal case are in the same kind of relationship and whether the rationales that support "special solicitude" in maintenance and cure cases apply in this context and support applying special solicitude here. They do not.

A. "Special Solicitude" Is Maritime Law's Attempt to Equalize the Relationship Between the Master and Sailors.

"[A]dmiralty courts have always shown a special solicitude for the welfare of seamen and their families." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990). The most famous expression of this solicitude, of course, is the requirement that ship owners pay maintenance and cure to sailors injured during a voyage. *See Aguilar v. Standard Oil Co. of N.J.*, 318 U.S. 724, 731 n.6 (1943) ("[I]f by the master's orders and commands any of the ship's company be in the service of the ship, and thereby happen to be wounded or otherwise hurt, in that case they shall be cured and provided for at the costs and charges of the said ship.") (quoting the Laws of Oleron art. VI). This requirement—a kind of proto-workmen's compensation program, which has largely been displaced in modern times by the Jones Act and other statutory enactments—is considered to be implicit in every maritime contract and inalienable. *See De Zon v. Am. President Lines*, 318 U.S. 660, 667 (1943) ("[T]he maritime law annexes a duty that no private agreement is competent to abrogate [to] the maintenance and cure of the seaman for illness or

injury during the period of the voyage, and in some cases for a period thereafter.").

The economic rationale for the requirement to provide maintenance and cure is to align the sailor's and master's incentives, convincing people to undertake the perils of the sea with the knowledge that if they sustain an injury, they will be cared for. *See The Law of Admiralty* § 6-6 (2012) (citing *Harden v. Gordon*, 11 F. Cas. 480, 483 (C.C.D. Me. 1823) (Story, J.)). It also springs from long experience of the unique relationship between the owner or master and the sailor. "Ever since men have gone to sea, the relationship of master to seaman has been entirely different from that of employer to employee on land." *S. S.S. Co. v. N.L.R.B.*, 316 U.S. 31, 38 (1942). The master has near total control over the ship and all on it, and the relationship between master and sailor has few analogues on land. Because the lives of the crew and passengers and the welfare of the cargo are the master's responsibility, "the law has always recognized" that "[h]e must command and the crew must obey." *Id.* In seeing to this responsibility, "[t]he master's authority is quite despotic, and sometimes roughly exercised." *Cortes v. Baltimore Insular Lines*, 287 U.S. 367, 377 (1932) (quoting *Scarff v. Metcalf*, 13 N.E. 796, 797 (N.Y. 1887)).

The uniquely authoritarian nature of the master-sailor relationship has obvious potential for abuse, since the master has "sagacity and superior knowledge," which permits him to trick or bully the improvident seaman into giving up rights. *The Law of Seamen* §24.2 (1993). The law's special solicitude for sailors is thus "prompted by the limits upon their

ability to help themselves." *S. S.S. Co.*, 316 U.S. at 39. Admiralty courts treat sailors as "wards" in recognition of their uniquely powerless position vis-à-vis the master, in order "to protect them from the harsh consequences of arbitrary and unscrupulous action of their employers, to which, as a class, they are peculiarly exposed." *Collie v. Fergusson*, 281 U.S. 52, 55 (1930). *See also Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 430 (1939) ("The seaman, while on his vessel, is subject to the rigorous discipline of the sea and has little opportunity to appeal to the protection from abuse of power which the law makes readily available to the landsman.").

B. The Rationales That Support "Special Solicitude" Do Not Apply In Bare-Metal Cases.

This special solicitude for mariners is thus peculiarly relational; that is, it derives from the unique relationships that arise from the singular setting of the ship at sea. *See Cortes*, 287 U.S. at 377 ("The conditions at sea differ widely from those on land, and the diversity of conditions breeds diversity of duties."). But the fact that admiralty courts give seamen "special solicitude" where appropriate does not mean that whenever courts are confronted by broad policy issues, the seaman must always win. *Cf. Apex Marine*, 498 U.S. at 36 (admiralty courts should not "expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them"). Even a liberal construction "can find limits in . . . language, context, history, and purposes." *Watson v. Philip Morris Cos., Inc.*, 551 U.S. 142, 147 (2007). Just as "it is quite mistaken to

assume . . . that whatever might appear to further [a] statute's primary objective must be the law," *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (quotation marks omitted), courts have no warrant to invent a seaman-wins principle unmoored from the unique features of maritime life. Rather, courts must carefully consider whether the case presents a circumstance where a maritime-specific liberal construction is appropriate or whether other background common law rules should apply.

This is where the Third Circuit, in its rote invocation of "special solicitude," went wrong. The court never paused to consider whether the rationale that supports treating sailors with special solicitude applies in the context of bare-metal cases. It does not, for four reasons.

First, even assuming (for the sake of argument) that the antiquated view of sailors as uniquely helpless in the face of the captain's tyranny remains relevant in the 21st century, it is irrelevant in a circumstance where (as here) the sailor-plaintiff and the defendant have no relationship *at all*, let alone one that can be exploited. The bare-metal manufacturer has no relationship (employment, contractual, or otherwise) with the injured sailor, and certainly none that could be characterized as "despotic, and sometimes roughly exercised." *Cortes*, 287 U.S. at 377. Without any relationship between the parties, there is no inequality that needs to be counterbalanced—and thus no call to apply "special solicitude" for the injured seaman in determining whether to recognize a novel tort claim against a manufacturer that did not make or install the

asbestos that allegedly injured him. The Third Circuit never considered why the provision of bare-metal products—a hands-off, third-party transaction, often separated by years if not decades between the provision of an asbestos-free product and the sailor's injury—should be governed by a principle that has its root in equalizing a relationship that does not exist.

Second, special solicitude is justified on the basis of a set of unique perils to which seamen are exposed while serving the interests of the master and owner. *See Chandris, Inc. v. Latsis*, 515 U.S. 347, 355–56 (1995) (sailors are wards of the admiralty court because they "are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour") (quoting *Harden*, 11 F. Cas. at 485). "[T]he protection of maritime law, statutory as well as decisional," is thus directed toward "[a]ll who work at sea in the service of a ship" because of "those particular perils." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 354 (1991). But bare-metal manufacturers do not expose seamen to risks unique to the sea. People in all kinds of employment may be exposed to potentially hazardous products, including specifically asbestos. *See, e.g.*, Nat. Inst. for Occupational Safety and Health, Work-Related Lung Disease Surveillance Report 2007, at 10 (2008) (listing common asbestos-exposed industries and occupations), *available at* http://bit.ly/2zFcBnk. There is no basis to create a special claim for seamen to address this common risk that is in no way specific to the perils of being a seaman.

Third, "special solicitude," as noted above, has its roots in the requirement to pay maintenance and cure to injured seamen. Without subjecting masters to this nearly unshakeable requirement, courts recognized, sailors would likely be "put ashore, perhaps in a foreign port, without means of support, or hope of obtaining medical care." *Vaughan v. Atkinson*, 369 U.S. 527, 535 (1962). By making the liability strict (except in narrow circumstances involving injury from some willful act of the sailor), there was no longer any incentive for the master to delay paying maintenance and cure while courts adjudicated liability. But in almost any bare-metal case, a plaintiff's medical and maintenance costs are covered by other sources, including private, union, or governmental insurance programs or, in appropriate cases, from trusts established pursuant to 11 U.S.C. § 524(g)(2), which requires asbestos trusts funded from bankruptcy proceedings to "operate through mechanisms . . . that provide reasonable assurance that the trust will . . . be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner." As petitioners note, these trusts have to date paid out more than $10 billion to hundreds of thousands of asbestos plaintiffs. Pet. Br. 37. Bare-metal plaintiffs are thus in no disadvantaged position vis-à-vis other asbestos plaintiffs. Their sought-for tort remedy likewise ought to be governed by standard tort principles that apply to all asbestos plaintiffs, without putting a thumb on the scales for a particular class of favored plaintiff. One of those background tort principles, as petitioners note, is that "[m]anufacturers are not liable for injuries

caused by products that they did not make, sell, or distribute, even if those products might foreseeably be used with their own." Pet. Br. 18.

Finally, special solicitude generally plays out as a limitation on the defenses to liability that a maritime defendant can invoke. That is, consistent with the strict liability nature of maintenance and cure, courts will not permit maritime defendants to invoke tort defenses that, in other contexts, allow defendants to avoid liability for personal injury. *See, e.g.*, *Aguilar*, 318 U.S. at 731 ("Conceptions of contributory negligence, the fellow-servant doctrine, and assumption of risk have no place in the liability or defense against [maintenance and cure]."). But there is no precedent that suggests that special solicitude runs so far as to create whole new areas of liability contrary to the common law. In fact, this Court expressly disclaimed the power to "expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them." *Apex Marine*, 498 U.S. at 36. Even in admiralty, common law courts seeking to determine whether a defendant may be held liable should "draw guidance from, *inter alia*, the extensive body of state law applying proximate causation requirements and from treatises and other scholarly sources." *Sofec*, 517 U.S. at 839. A central premise of that "extensive body of state law" is that manufacturers may not be held liable for injuries caused by *others'* products. Pet. Br. 18–34. This established body of law, rather than inapplicable notions of special solicitude for sailors, should govern this case.

CONCLUSION

The Court should reverse and remand with instructions to affirm the District Court's entries of summary judgment for petitioners.

Respectfully submitted.

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